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To Educate or to Make a Profit: Compensating College Athletes' Families for Travelling Expenses

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TO EDUCATE OR TO MAKE A PROFIT:
COMPENSATING COLLEGE ATHLETES' FAMILIES
FOR TRAVELLING EXPENSES

*"The old model of amateurism doesn't work. College has become a minor league for the pros."*¹

I. INTRODUCTION

Since the founding of the National Collegiate Athletic Association ("NCAA" or "Association"), the college sports fan base has become the largest in the sports industry, giving college athletes an ever-increasing status and value in society.² The NCAA athletics fans base is also the wealthiest, most diverse, and therefore most lucrative of all sports.³ Major sports networks attribute large portions of their revenues to college sports viewership.⁴ Prospective college athletes from around the world aspire for the opportunity to compete for American college sports teams, and NCAA Division I teams recruit around 3,000 international athletes per year.⁵ What continues to contribute to the success of college sports is the NCAA's focus on education as the priority motivating its policies.⁶ Part of this focus is the desire to "preserv[e] an academic environ-

1. Mark Koba, *How College Athletes Could End Up Getting Paid Like Pros*, CNBC (Feb. 3, 2013, 3:05 PM), <http://www.cnbc.com/id/100420450> (quoting Scott Minto, Director of San Diego State University Sports MBA Program).

2. See *The Largest, Most Attractive Fan Base in Sports*, IMG COLLEGE, <http://www.imgcollege.com/why-college> (last visited Apr. 14, 2016) (discussing the "booming business" and continued rise of college sports); Glenn M. Wong, Christopher R. Deubert & Justin Hayek, *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 MOORAD SPORTS L.J. 1, 2 (2015) (recognizing college sports as fostering high degree of loyalty and attachment that rivals professional sports).

3. See Wong et al., *supra* note 2, at 2 (distinguishing college sports from professional sports by audience's appreciation and respect for higher education goals and institution).

4. See *id.* at 24–25 (describing growth of viewership for cable networks broadcasting college sporting events and dramatic rise in momentum and gains for television networks).

5. See Erin Abbey-Pinegar, Note, *The Need for a Global Amateurism Standard: International Student-Athlete Issues and Controversies*, 17 IND. J. GLOBAL LEGAL STUD. 341, 342 (2010) (noting athletic and academic scholarship opportunities NCAA competition provides for international athletes).

6. See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Apr. 14, 2016) (describing amateurism as NCAA's method to achieve goal of education and competition).

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ment.”⁷ The Association substantiates its regulation decisions on providing quality education and equitable competition.⁸

Despite the Association’s restriction on compensation for college athletes, it recently granted a travel expenses waiver.⁹ The waiver permits colleges to compensate families of student-athletes to travel to Final Four and College Football Playoff games.¹⁰ The waiver promises up to \$3,000 in expenses for families travelling to Final Four games and up to \$4,000 for travel to the championship game.¹¹ It also grants member institutions the option to provide additional benefit for these and other championships.¹² When the waiver was released, the NCAA’s vice president stated that in enacting the waiver, the NCAA was dedicated to including families in the championship experience.¹³

This move by the NCAA raises issues concerning the apparent paradigm shift indicated by the decision to compensate parents and families while restrictions on player compensation remain so tightly enforced.¹⁴ Indeed, until the waiver was announced, any money given to an athlete’s family for travel to championship games would have been penalized with ineligibility.¹⁵ The waiver brings the

7. *Id.* (listing NCAA’s emphasis on amateur status through strict requirements limiting college athlete activity such as: receipt of salary, agent representation, and receipt of rewards or prizes).

8. *See* NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA ELIGIBILITY CENTER QUICK REFERENCE GUIDE, available at http://fs.ncaa.org/Docs/eligibility_center/Quick_Reference_Sheet.pdf (setting forth pre-eligibility, qualifying, and academic requirements allowing players to retain amateur status and comparisons to other NCAA institutions).

9. *See* NCAA to Pay for Family Travel Under Pilot Program, NCAA (Jan. 6, 2015, 2:31 PM), <http://www.ncaa.org/about/resources/media-center/news/grants-waiver-college-football-playoff-national-championship> (announcing NCAA’s travel expense waiver). The waiver was announced January 6, 2015, and follows NCAA’s past decisions to provide exclusive tickets and to host receptions for athletes’ families. *See id.*

10. *See id.* (describing NCAA’s promise to assist families with travel expenses to out-of-town championship and playoff games).

11. *See id.* (describing benefits to be made available to families of athletes competing in sufficiently elite competition tournaments or games).

12. *See id.* (describing NCAA’s permission to member institutions to provide additional travel benefits when universities deem appropriate on more permanent basis).

13. *See id.* (describing NCAA’s statement of waiver as progress in its current goal to improve student-athlete experience).

14. *See* Andy Schwartz, *Wait, the NCAA Can Pay Players’ Parents Now?*, REGRESSING (Jan. 7, 2015, 10:41 AM), <http://regressing.deadspin.com/wait-the-ncaa-can-pay-players-parents-now-1677853402> (discussing travel expense waiver as contradictory to NCAA’s regulations and calling apparent restriction on athlete compensation into question in light of previous decisions).

15. *See id.* (illustrating contradictory nature of NCAA’s travel waiver announcement); *see also* NAT’L COLLEGIATE ATHLETIC ASS’N, 2015–16 NCAA DIVISION

NCAA one decision closer to student-athlete compensation.¹⁶ By delegating funds to athletes' families dependent on whether the teams make it to the playoffs, the NCAA is creating a relationship, however indirect, between performance and financial benefit awarded to the players' families.¹⁷ Fifty percent of college students are financially supported by their parents, which means that when the NCAA provides monetary benefits to an athlete's family, the athlete will likely benefit in some way as well.¹⁸ Regardless, the NCAA continues to hold firm on its stance that paying college athletes for their athletic performance is counterintuitive to its mission and purpose in regulating college sports.¹⁹

The amateurism goal is central to preserving the pro-competitive nature of the college sports industry.²⁰ The Association claims that it seeks to protect consumer demand by keeping student-athletes from receiving large sums of money for playing college sports.²¹ It also claims that allowing compensation would interfere with student-athletes' education while hindering athletic integrity.²²

I MANUAL, arts. 10.1, 12.3.1.3, (2015) [hereinafter 2015–16 NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D116JAN.pdf> (setting forth NCAA bylaws).

16. See Schwartz, *supra* note 14 (finding NCAA's purported commitment to restricting athlete compensation inconsistent with travel waiver announcement).

17. See Ralph D. Russo, *CFP, NCAA Will Reimburse Athletes' Families for Travel*, YAHOO! SPORTS (Jan. 6, 2015, 10:08 PM), <http://sports.yahoo.com/news/cfp-ncaa-reimburse-athletes-families-travel-195435226—ncaaf.html> (elaborating NCAA's payment scheme for travel compensation based on teams' advancement).

18. See Quentin Fottrell, *Half of College Graduates Expect to be Supported by Their Families*, MARKETWATCH.COM (May 23, 2015, 7:32 AM), <http://www.marketwatch.com/story/half-of-college-graduates-expect-to-be-supported-by-their-families-2015-05-19> (reporting statistics demonstrating financial support students receive from their families during and after college).

19. See Stephen J. Kastenberg & Marcel S. Pratt, *NCAA Cannot Bar Compensation of Student-Athletes for Use of Their Names and Likenesses, Federal Court Says*, BALLARD SPAHR (Aug. 11, 2014), <http://www.ballardspahr.com/alertspublications/legalalerts/2014-08-11-ncaa-cannot-bar-compensation-of-student.aspx> (emphasizing NCAA's determination to stand strong on its view that restricting compensation is pro-competitive); see also *Amateurism*, *supra* note 6 (detailing NCAA's emphasis on amateurism rules); *O'Bannon v. Nat'l Collegiate Athletic Assoc.*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014) (acknowledging validity of NCAA's justifications for some compensation restrictions), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

20. See Kastenberg & Pratt, *supra* note 19 (describing potential for student-athlete compensation as disrupting cooperation between member schools, both athletically and academically).

21. See *id.* (explaining NCAA sanctions that exist to penalize schools for violating compensation rules to prevent schools from taking advantage of recruiting inequalities).

22. See *id.* (stating NCAA's position that athlete compensation would interfere with education and integration of student-athletes in their academic communities).

The amateurism goal serves to prevent the commercial exploitation of student-athletes.²³

Concerns about the NCAA's inconsistent stance when it comes to player compensation are nothing new, and the waiver only exacerbates this issue.²⁴ In an apparent attempt to quell criticism about its stingy anti-compensation policies, the NCAA proudly announced the waiver without specifying what enabled it to do so.²⁵ Along with the announcement, the Association proclaimed that it had been discussing travel expenses compensation for the past few years.²⁶ NCAA President Mike Emmert declared that the waiver has been considered since 2011 and was the next step in "improving the student-athlete experience," along with extended scholarship opportunities.²⁷ Despite the NCAA's proclaimed justifications, the travel expense waiver exceeds the scope of the NCAA's goal in restricting compensation.²⁸ The fallout from the waiver, therefore, has the potential to result in teams continuing to maneuver around the NCAA restrictions and lead to numerous lawsuits filed by student-athletes.²⁹

Courts have considered the student-athlete's right to compensation using both the Sherman Antitrust Act,³⁰ and the NCAA's am-

23. See *id.* (describing NCAA's concerns over negative impacts on consumer perception and demand).

24. See Schwartz, *supra* note 14 (discussing negative public opinion about NCAA's justification for amateurism and anti-compensation policies). Although the NCAA claims to hold firm on its policies, recent events have shown differently. In January 2015, Ohio State University expressed outrage over the Association's refusal to assist families with travel, and two days later the NCAA announced that it would allow Ohio State to grant these travel benefits for families' travel to football playoff games. See Jon Solomon, *How Ohio State, Oregon Got NCAA Family Stipend Passed in 2 Days*, CBS SPORTS (Jan. 6, 2015, 1:44 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24939125/ohio-state-ad-expects-hurdles-on-proposal-for-paid-playoff-family-travel> (describing NCAA's change in policy in response to complaints from member institutions about inconsistent enforcement of sanctions).

25. See Schwartz, *supra* note 14 (noting lack of justification for travel waiver backed by any significant provision in NCAA bylaws).

26. See *NCAA to Pay for Family Travel Under Pilot Program*, *supra* note 9 (quoting NCAA Vice President's statement of NCAA's goals toward continuing progress in family and travel accommodation).

27. See *id.* (quoting NCAA President, Mark Emmert's explanation of travel waiver development).

28. See *Amateurism*, *supra* note 6 (proclaiming strict anti-compensation policies and eligibility requirements). The NCAA's description of its amateurism goals seems to leave no room for any fluctuation or modification to the platform. See *id.*

29. See generally *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996 (N.D. Cal. 2013) (discussing student athletes' demand for compensation for use of name and likenesses).

30. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2004). For further discussion of the Sherman Act and its application to NCAA regulation, see *infra* notes 96–107.

ateurism standards.³¹ Historically, the NCAA had free rein in enacting regulations in furtherance of amateurism.³² However, increasing challenges are beginning to erode the liberty it once enjoyed.³³ Students have claimed that the NCAA restrained trade in restricting licensing and use-of-likeness compensation in both the college education and broadcasting markets.³⁴ These restrictions are based on the exclusive nature of the college sports market and the explicit control the NCAA has over its revenue.³⁵

Courts have also begun to approach the NCAA regulations more harshly in light of its apparently wavering standards.³⁶ The market justification previously allowed has since been challenged and sincerely questioned.³⁷ Judicial history suggests that if the NCAA does not more clearly establish the goals of its restrictions, it may be subjected to numerous antitrust violations.³⁸ Courts now place a higher burden on the NCAA to produce evidence that its regulation has pro-competitive effects.³⁹ The variety of avenues available to student-plaintiffs seeking compensation will be expanded by the introduction of the travel expenses waiver.⁴⁰

31. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331–37 (2007) (discussing NCAA justifications); see also *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 2:00-CV-1439, 2002 WL 32137511, at *14–15 (S.D. Ohio July 19, 2002) (analyzing student compensation under antitrust standard).

32. See Lazaroff, *supra* note 31, at 337 (describing courts' general deference toward NCAA policies and purported goals on amateurism basis alone). In the past, courts did not question the NCAA restrictions, trusting the mere assertion of competitive balance and amateurism as sufficient justifications. See *id.* (setting out historical evolution of NCAA compensation policies).

33. See *id.* at 339–40 (describing recently growing changes in evolution of student-athlete claims against NCAA and courts beginning to hear and give credence to such claims).

34. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 999 (setting forth plaintiffs' claims against NCAA for nonconsensual commercial use of their names and likenesses).

35. See *id.* at 1002–04 (describing NCAA's role in market such that it exercises control over licensing and use of student athletes' names and likenesses, subjecting it to possible antitrust actions).

36. See Lazaroff, *supra* note 31, at 353 (discussing courts' recent trend in approaching student claims against NCAA same way as other antitrust claims, giving more weight to NCAA's impact on students and economic market).

37. See *id.* at 350–51 (discussing courts' permission of NCAA restrictions on market distinction, which relies on premise that competitive balance and eligibility concerns are sufficient to exclude it from antitrust violations).

38. See *id.* at 343 (noting that courts are no longer exclusively convinced by NCAA's justification that all of its restrictions have anticompetitive effects).

39. See *id.* (describing new standard that NCAA must show obvious or demonstrable pro-competitive effects in order to avoid antitrust challenges).

40. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996 (N.D. Cal. 2013) (describing likeness licensing litigation);

This Comment will critically analyze the NCAA's announcement of the travel waiver with respect to its historical objectives and challenges in enforcing its policies, specifically focusing compensation restrictions. Section II will discuss the history and development of the NCAA's amateurism policies, which have driven its compensation restrictions, and how the NCAA and courts have handled and justified the policies when challenged.⁴¹ Section II will then assess the travel expense waiver as related to the Association's stated objectives. Section III will detail how antitrust claims factor into the compensation restrictions, defining the college sports market and the role of NCAA regulations in antitrust challenges.⁴² Section IV will provide support for the legitimate goals of NCAA regulation, detail the existing options and provide suggestions for how to reconcile the NCAA's important objectives with students', universities' and the public's exploitation concerns.⁴³ Section V will discuss the consequences that the travel waiver implicates, and the potential consequences of lifting compensation restrictions.⁴⁴ Finally, Section VI will summarize the travel waiver's contribution to existing complaints about student-athlete compensation and the future litigation and conflict it is likely to cause.⁴⁵

II. BACKGROUND: THE SLOWLY ERODING BASIS FOR NCAA JUSTIFICATIONS

A. The Formation and Degradation of the NCAA's Amateurism Rules

Since the NCAA was founded, it has instituted restrictions on member colleges paying student-athletes.⁴⁶ The Association sets a number of goals in support of these restrictions, some of which are

Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, No. 2:00-CV-1439, 2002 WL 32137511 (S.D. Ohio July 19, 2002) (describing antitrust litigation); Corman v. Nat'l Collegiate Athletic Ass'n, 74 A.3d 1149 (Pa. Commw. Ct. 2013) (discussing commerce clause implications).

41. See *infra* notes 46–94 and accompanying text (providing background for NCAA policies and introducing student-athlete litigation).

42. See *infra* notes 95–142 and accompanying text (discussing influence of Antitrust law on NCAA compensation restrictions).

43. See *infra* notes 143–69 and accompanying text (describing justifications for amateurism rules and suggesting alternatives to student compensation).

44. See *infra* notes 170–90 and accompanying text (discussing travel waiver's possible effects on college sports and compensation policies).

45. See *infra* notes 188–97 and accompanying text (describing travel waiver's current and future implications).

46. See Lazaroff, *supra* note 31, at 331, 334–36 (detailing history and formation of NCAA).

contradicted by the travel expense waiver.⁴⁷ These goals motivate and justify compensation restrictions pertaining to recruitment, likeness licensing or any other type of conduct the NCAA deems inappropriate.⁴⁸ The NCAA's main goals are: to maintain competitive balance between amateur athletic teams, keep a clear line distinguishing professional and amateur sports, preserve the identity and integrity of college sports, and to maintain a prominent media audience for college sports.⁴⁹ Over the years, courts deciding student-athlete compensation cases have taken these NCAA arguments into account.⁵⁰ Historically, the NCAA has generally been able to convince the court of its legitimate purposes.⁵¹

More recently, courts have loosened the strict stance on certain aspects of the compensation restrictions, putting the travel expense waiver at risk for stirring up even more litigation.⁵² This has the potential to stir up more litigation and weaken faith in the NCAA's justifications and purposes, ultimately risking the degradation of its mission and platform.⁵³ Such decisions require more of a showing that the NCAA has substantial goals for restricting compensation, without imposing unnecessary limits on the student-athlete mar-

47. See 20015–16 NCAA MANUAL, *supra* note 15 at art. 12 (setting out rules for amateurism and eligibility). The NCAA's provision of any benefit, not limited to monetary compensation, is strongly forbidden by the NCAA, which leaves no room for discretion in providing benefits outside of already permissible conduct. See *id.* at art.12.3.1.3

48. See *id.* at arts. 12.1.2, 19.5 (setting out specific anticompetitive violations and conduct which NCAA deem to be violations and subject to sanction).

49. See Lazaroff, *supra* note 31, at 358–59 (discussing NCAA's intentions in creating and enforcing amateurism rules).

50. See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (observing that preservation of college athletics warranted compensation restrictions); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (recognizing competitive balance objective); Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, No. 2:00-CV-1439, 2002 WL 32137511 (S.D. Ohio July 19, 2002) (recognizing pro-competitive justifications).

51. See *Worldwide Basketball & Sports Tours*, 2002 WL 32137511, at *16–17 (holding that NCAA restrictions caused no identifiable harm on athletes or college sports market).

52. See, e.g., O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1008–09 (N.D. Cal. 2014) (prohibiting NCAA restrictions on allowing players compensation for certain likeness royalties), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

53. See *id.* at 963 (holding that if NCAA fails to convince court of its precompetitive justifications, court may impose permanent injunctions on NCAA compensation restrictions).

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ket.⁵⁴ In addition, these decisions indicate a shift away from deferring to the NCAA in compensation challenges.⁵⁵

B. Concern on All Fronts: Fallout From the Travel Expenses Waiver

When the NCAA announced its travel expense waiver in January 2015, the media sprang to life with skepticism about what this meant for the NCAA.⁵⁶ Questions centered on the issues of eligibility rules and the general ban on financing athletes and their families.⁵⁷ Even those who have favored student-athlete compensation have questioned the Association's motives.⁵⁸ The waiver presents two potential issues in enforcing the NCAA's amateurism model: the NCAA's actual motivation in amateurism restrictions and the likely resulting outpouring of litigation opened up by the allowance of travel expenses.⁵⁹

1. *Compromise or Corruption: The NCAA's Motivation*

The first consideration in assessing the NCAA's motivation for the waiver is the recipients of the stipend, which are participants in the Final Four Championship and the men's Football Playoff.⁶⁰ The announcement of the waiver came with statements about families sharing in the championship experience, but made no refer-

54. See *id.* at 979 (noting NCAA's minimal showing of evidence of competitive balance).

55. See Kastenber & Pratt, *supra* note 19 (discussing legal implications and risks NCAA and universities will face in light of recent court decisions).

56. See Jack Andrade, *NCAA Changes Tune, Will Pay Travel Expenses for Families of Athletes*, BOSTON.COM (Jan. 7, 2015), <http://www.boston.com/sports/untagged/2015/01/07/ncaa-changes-tune-will-pay-travel-expenses-for-families-of-athletes> (discussing controversial nature of NCAA's decision with public scrutiny ramifications). Critics argue that because the NCAA has not spoken to why the provision of travel expenses was not allowed until now, there is little support for any compensation restrictions the NCAA maintains. See Schwartz, *supra* note 14 (noting lack of foundation for compensation rules).

57. See Schwartz, *supra* note 14. (noting skepticism about NCAA waiver potentially violating its own rules).

58. See *id.* (noting that waiver raises questions about NCAA ineligibility rules concerning student athlete compensation); see also Schwartz, *supra* note 14 (asserting that NCAA skates fine line between compensating students and compensating their parents).

59. For a general discussion of the NCAA's motivation, see *infra* notes 60–73 and accompanying text. For a discussion of the potential resulting litigation, see *infra* notes 75–85 and accompanying text.

60. See *NCAA to Pay for Family Travel Under Pilot Program*, *supra* note 9 (announcing which families would be eligible for travel compensation).

ence to other championships outside of these two sports.⁶¹ Because the men's basketball tournament is a hefty contributor to the NCAA's budget, this delegation raises suspicions.⁶² Critics have argued that in order to retain its reputation, the NCAA would have to compensate families for travel to championship games of every sport.⁶³

Another consideration is the NCAA's own prohibition on transportation benefits, which has not been altered since the waiver was announced.⁶⁴ On its face, the prohibition declares the travel expense waiver unethical.⁶⁵ In enacting the waiver, the NCAA showed no intention of modifying its by-laws to reflect the departure.⁶⁶ The only way to begin reconciling the waiver with the NCAA by-laws is to declare that the only two parties permitted to pay travel expenses are the NCAA and its member colleges.⁶⁷ However, the NCAA did not make this delineation and has not answered many inconsistency concerns.⁶⁸

Third is the waiver's conflict with its professed motives in enacting and maintaining compensation restrictions.⁶⁹ Currently, student-athletes' permission to use their names and likenesses is part

61. *See id.* (mentioning only basketball and men's football post-season games as eligible for family travel benefits). The NCAA, while acknowledging the importance of other Division I sporting events, has not spoken to why travel expenses will not be extended to those events. *See* Schwartz, *supra* note 14 (noting discrepancies in NCAA's travel waiver and its previous decisions).

62. *See* Jonathon Berr, *March Madness: Follow the Money*, CBS MONEYWATCH (Mar. 20, 2015, 5:45 AM), <http://www.cbsnews.com/news/march-madness-follow-the-money/> (noting that men's March Madness tournament is NCAA's largest source of revenue); *see also* Jake New, *Forgetting Title IX*, INSIDE HIGHER ED (Jan. 15, 2015), <https://www.insidehighered.com/news/2015/01/15/changes-ncaa-rules-raise-title-ix-concerns> (asserting that NCAA's source of money is no excuse for discriminating in giving benefit to college teams).

63. *See id.* (noting dissatisfaction at inequality of NCAA provision of travel benefits).

64. *See* 2015–16 NCAA MANUAL, *supra* note 15, at art. 12.3.1.3 (deeming any player ineligible if player or player's relatives receives benefits, including transportation from any outside agent).

65. *See id.* at art. 10.1(c) (finding any provision of additional benefits to student athletes unethical violation of bylaws).

66. *See NCAA to Pay for Family Travel Under Pilot Program*, *supra* note 9 (indicating no reconciliation between bylaws and travel waiver, or any kind of loophole in existing rules).

67. *See* Schwartz, *supra* note 14 (speculating that waiver implies only NCAA and universities have authorization under waiver, while not explicitly forbidding others from contributing).

68. *See id.* (expressing concern that waiver's unspecified range of donors will result in boosters, sponsors, and other interested parties' provision of travel benefits, in direct violation of NCAA policy).

69. For a discussion of the NCAA's goals in maintaining compensation rules, *see infra* notes 46–49 and accompanying text.

of the recruitment process, but with new lawsuits pushing the limits, member institutions may also begin pushing back for permission to use formerly restricted methods of recruitment.⁷⁰ This would open up to various legal issues involving universities trying to get around the NCAA restrictions to compete in recruiting athletes.⁷¹ Allowing schools to pay for families' travel expenses attacks the balance between athletic teams.⁷² As a result, travel expenses have the potential to become another tool for schools as they attempt to recruit players.⁷³

2. *NCAA Opens the Door to a Roomful of Litigation*

Student-plaintiffs seeking compensation for their athletic performance have come at the NCAA from all sides.⁷⁴ Most recently, in *O'Bannon v. National Collegiate Athletic Association*,⁷⁵ college athletes brought an antitrust action against the NCAA concerning a names and likenesses dispute.⁷⁶ The student-athletes wanted a share of revenues generated by the NCAA and member schools using the students' names and likenesses in video games, telecasts, and other media footage.⁷⁷

In support of their demands, the plaintiffs alleged that the NCAA rules restricting such revenue sharing violated antitrust laws.⁷⁸ In their allegations, the plaintiffs argued that because Divi-

70. See Kastenberg & Pratt, *supra* note 19 (discussing students' and universities' suggestions to provide stipends based on game attendance, and shares of licensing revenue to student-athletes).

71. See *id.* (describing unfettered disruption likely to result from undermining NCAA objectives).

72. See *id.* (noting courts' and NCAA's concerns of commercial exploitation of student-athletes).

73. See *id.* (discussing legal and anti-competitive issues implicated by loosening NCAA compensation restrictions). NCAA member universities currently use academic scholarships and quality of athletic facilities to recruit players for their programs. Loosening the restrictions would subject universities to increased variety and unbalanced inequality in recruiting, potentially disrupting the NCAA's competitive platform. See *id.* (noting NCAA foundational justification for pro-competitive philosophy).

74. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 998–99 (N.D. Cal. 2013) (describing likeness licensing litigation); *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 2:00-CV-1439, 2002 WL 32137511, at *3–4 (S.D. Ohio July 19, 2002) (describing antitrust litigation); *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1168–70 (Pa. Commw. Ct. 2013) (discussing commerce clause implications).

75. 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

76. See *id.* at 962–63 (summarizing litigation).

77. See *id.* at 962 (setting out plaintiffs' claims).

78. See *id.* at 963 (describing plaintiffs' Sherman Act challenge).

sion I teams are their only avenue to a professional career, student-athlete recruits have no option but to permit the universities and the NCAA to use their names and likeness without compensation.⁷⁹ Therefore, the students claimed, the NCAA's refusal to allow compensation beyond scholarship awards restrains trade within the market of college athletic institutions.⁸⁰

While conceding that its regulations may restrain trade in the college athletics market, the NCAA argued that the restraints were not unlawful because they achieved "pro-competitive purposes."⁸¹ Therefore, any hindrance on competition between colleges in recruiting athletes is enforced in the interest of equal competition among college teams.⁸² The district court, while acknowledging that the NCAA may be justified in this goal, also voiced doubt in the NCAA's general stance and policy.⁸³ The opinion stated that its "other rules and practices suggest that the Association is unconcerned with achieving competitive balance."⁸⁴

C. Back to Basics: The Board of Regents Standard

An early challenge to the NCAA compensation rules came in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.⁸⁵ The plaintiffs were NCAA member colleges who felt that they lacked sufficient influence in the NCAA's regulation decisions.⁸⁶ The plaintiffs asserted that the NCAA's television program restriction, which limited the number of college games broad-

79. *See id.* at 966 (laying out allegations in support of plaintiffs' antitrust claims).

80. *See id.* at 966–67, 971–73 (summarizing evidence regarding college education and athletic "market", and asserted restraints of trade).

81. *See id.* at 973. (describing NCAA's pro-competitive purposes as: promoting integration of athletics and academics, maintaining competitive balance, and increasing output of college sports product).

82. *See id.* (describing NCAA claims that education is at center of any compensation decision, and amateurism tradition is best preserved by restricting compensation).

83. *See id.* at 975–76 (finding amateurism to be solid justification for NCAA's compensation restrictions, but finding that NCAA had not effectively substantiated its claims and had been too inconsistent in its enforcement).

84. *Id.* at 978. The Ninth Circuit Court of Appeals agreed with the district court's decision that the NCAA regulations violated antitrust laws, but reversed the injunction requiring schools to pay athletes name and likeness royalties, reasoning that paying the student-athletes would "vitiate their amateur status as collegiate athletes." *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1077 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

85. 468 U.S. 85 (1984).

86. *See id.* at 94 (noting member universities' dissatisfaction with NCAA sanction policies).

cast, was a restraint of trade in violation of the Sherman Act.⁸⁷ The NCAA defended that the plan was necessary to ensure live attendance at college football games, which is instrumental in maintaining the integrity of the sport.⁸⁸

The Supreme Court held that in order to preserve the quality of college athletics, students must not be paid.⁸⁹ The Court stated that this was appropriate in light of the NCAA's need to maximize consumer demand for amateur athletics.⁹⁰ The Court also stated that the market needed to be preserved and that the NCAA's regulations were an effective way of protecting the amateur competition in light of the nature of college sports.⁹¹ This decision represents the hard line once drawn by the NCAA in its goal to maintain amateurism and pro-competitive balance.⁹² The Court also held that

87. *See id.* at 85 (describing plaintiff's claims against NCAA).

88. *See id.* at 116 (describing NCAA's defense based on protecting and insulating live ticket sales).

89. *See id.* at 100–02 (stating NCAA's goals in maintaining compensation restrictions and agreeing with NCAA that they promote integrity of education received).

90. *See id.* at 101 (recognizing that without restraints, market for college athletics would be unavailable). Writing for the Court, Justice John Paul Stevens described:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as precompetitive.

Id. at 101–02 (footnote omitted).

91. *See id.* at 117 (agreeing with NCAA that regulations served legitimate and important goals). The Court explained:

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore precompetitive because they enhance public interest in intercollegiate athletics.

Id. at 117 (footnote omitted).

92. *See* Lazaroff, *supra* note 31, at 338 (citing *Bd. of Regents*, 468 U.S. at 100–02) (noting that *Board of Regents* reinforced NCAA principle that competitive balance idea is “legitimate and important”).

the restraints were essential to the marketing, popularity, and identity of college sports.⁹³ During the next two decades, courts steadfastly held to the stance taken by the *Board of Regents* Court.⁹⁴

III. WHY ANTITRUST LAWS SHOULD THWART POTENTIAL LITIGANTS

A. Defining Commercial Entities

Those opposed to the NCAA's regulations have claimed that the restrictions violate the Sherman Act by limiting the market created by student-athletes' services and the use of their likenesses in the media.⁹⁵ The Sherman Act prohibits activities in restraint of trade or commerce; in other words, activities that have anti-competitive effects.⁹⁶ Because the statute is targeted at businesses and their particular markets, courts have held that it is not directly applicable to the student-athlete context.⁹⁷ Furthermore, in 2004 one federal court found that not only were the antitrust laws inapplicable to NCAA restrictions, but that the rules were not commercial.⁹⁸ In doing so, the court used the standard of whether the rules were commercial considering the surrounding circumstances.⁹⁹

93. See *id.* at 338–40 (discussing significance of Court's decision in *Board of Regents*, and vital role NCAA restraints have in enabling college sports market to prosper); see also *Bd. of Regents*, 468 U.S. at 100–02 (supporting justifications in support of NCAA's restraints on trade).

94. See Lazaroff, *supra* note 31, at 339 (stating that *Board of Regents* “laid a strong foundation for subsequent arguments that the antitrust laws should not invalidate restraints on competition for the services of NCAA student-athletes,” and “lower federal courts seized the opportunity to treat NCAA player restraints in a significantly different manner from other NCAA regulations”).

95. See Lazaroff, *supra* note 31, at 344 (discussing antitrust principles as related to NCAA restrictions, and legal implications).

96. See, e.g., *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 959 (6th Cir. 2004) (citing *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003)) (explaining that agreement may unreasonably restrain trade in violation of Sherman Act where it “produces significant anticompetitive effects within the relevant product and geographic markets”); see also 15 U.S.C. § 1 (2004) (prohibiting unlawful restraints of trade in interstate commerce).

97. See, e.g., *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that student athlete could not be deemed “competitor” in context of antitrust laws).

98. See *Pocono Invitational Sports Camp, Inc. v. Nat'l Collegiate Athletic Ass'n*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (treating NCAA restrictions as aiming to promote education and amateurism, and therefore immune to antitrust challenge).

99. See *id.* at 581 (stating that nature of conduct must be commercial in order to fit under antitrust analysis).

For the Sherman act to apply, not only must an entity be commercial, but the rule itself must also be commercial.¹⁰⁰ Additionally, commercial entities can be immune to antitrust challenges if a legitimate purpose exists for their regulation.¹⁰¹ The NCAA takes a paternalistic role in promoting legitimate goals, and therefore, its compensation regulations have not been held to warrant a Sherman Act challenge.¹⁰² In a sense, the NCAA has been exempted from susceptibility to the market in the context of these claims.¹⁰³

1. *Actual Economic Injury*

Antitrust law actually protects the competition itself, not the economic injury to the individual.¹⁰⁴ When there is actual economic injury caused by restraints on the market, it must be direct and substantial.¹⁰⁵ Students challenging the NCAA rules and seeking to prove actual injury must prove that the regulations have caused some other adverse effect.¹⁰⁶ More recently, the standard developed by the courts has been to reluctantly hold the NCAA to antitrust standards unless anticompetitive impact can be offset by benefits to the market.¹⁰⁷

2. *Relationship Between the Media, the NCAA, the College and the Athlete*

A popular criticism of the NCAA's strict regulations is the idea that the Association and its member schools make so much money from their athletes' performance that it is unjust for any share of

100. See *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 402–03, 405–06 (6th Cir. 1997) (noting accepted premise that actual competition in relevant market must exist in antitrust litigation).

101. See *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 743–45 (M.D. Tenn. 1990) (concluding that NCAA regulation need not be examined under antitrust laws because its overriding purpose was essential to maintaining important education standards).

102. See *Pocono Invitational*, 317 F. Supp. 2d at 584–85 (discussing NCAA's legitimate and necessary purpose in promoting compensation rules).

103. See *id.* at 585 (finding NCAA compensation restrictions not to be facially anticompetitive).

104. See *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 326 (1962) (deciding that regulated competitive market must be generally recognized by public).

105. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983) (setting forth standard for economic injury in application to antitrust principles).

106. See *id.* at 537 (interpreting statutory language to mean that judicial remedy in cases must remedy broader issues outside of specific antitrust plaintiff's claims).

107. See, e.g., *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (adopting standard when anticompetitive effects appear so obvious so as to warrant additional examination).

this revenue to be withheld from the athletes.¹⁰⁸ Proponents believe that athletes are the most important part of the revenue process but are unfairly cut out of being paid for their athletic performance.¹⁰⁹ Contrary to this view, athletic programs do not actually receive the amount of money that the media promulgates.¹¹⁰ In fact, it is not uncommon for teams in the NCAA tournament to lose money.¹¹¹ Division I programs generate hefty expenses in order to enhance the academic and athletic environment they can provide for their athletes.¹¹²

In addition, while schools may report portions of their budget as coming from television, they are usually unclear where their revenue actually comes from, and donors or sponsors are often the main source.¹¹³ Television companies are the beneficiaries of tournament broadcasting and high-priced ticket sales.¹¹⁴ While some teams may bring in more than others depending on how they choose to allocate funds, the only entities receiving substantially large profits from televising college sporting events are the broadcasting companies themselves.¹¹⁵ In addition, teams that have created their own broadcasting networks must also devote significant use of this medium to promote their academic programs, and with more sports networks being developed each year, colleges will have to allocate funds to combat conflicting messages.¹¹⁶

108. See Wong et al., *supra* note 2, at 18–20 (discussing public's approach in support of lifting NCAA restrictions).

109. See *id.* at 18 (noting pro-compensation view of imbalanced relationship between Division I schools and their athletes). The litigation focused on granting students more rights in receiving revenue for their performance threatens the fundamental nature of the NCAA's anti-compensation policies. See *id.* at 22 (describing student-plaintiff litigation raised in response to outrage at lack of student rights in revenue generated by college athletic programs).

110. See, e.g., Darren Rovell, *Many Tourney Teams Don't Turn Profit*, ESPN (Mar. 16, 2015), http://espn.go.com/mens-college-basketball/tournament/2015/story/_/id/12495302/many-ncaa-tournament-teams-did-not-turn-profit (listing several teams whose programs did not profit in 2015 NCAA basketball tournament).

111. See *id.* (describing money primarily allocated to student accommodation and coach salaries, at times withholding profit from athletic program).

112. See *id.* (describing money spent on high quality tutors, hotel accommodations for away games, and best coaches available).

113. See *id.* (noting athletic directors' statements that reported numbers, while accurate, do not always clearly represent status of program or sources of funds).

114. See *id.* (discussing major profit gained by television broadcasting companies and revenues received from NCAA teams themselves).

115. See *id.* (recognizing discrepancies in Division I teams' revenues, while no team's earnings from televising events rival those of networks and broadcasting companies).

116. See Transcript of *A Network of Their Own*, ON THE MEDIA (Feb. 5, 2010), available at <http://www.onthemedias.org/story/132664-a-network-of-their-own/>

3. *Where is the Market?*

In order to subject the NCAA rules to antitrust laws, there must be an existing relevant market and anti-competitive effects existing within the market.¹¹⁷ The Supreme Court has held that antitrust plaintiffs must prove that the defendant has caused damage by reaching into the specified commercial market.¹¹⁸ In order to conclude that a rule is commercial, it must be determined that the entity promulgating the rule is commercial.¹¹⁹

When an entity that would normally be held to the commercial antitrust standard engages in conduct that actually enhances its market, neither the market nor the entity will be viewed as relevant for antitrust market analysis. Courts have found that the market served by the NCAA is not deemed to be a relevant commercial market under the existing standard.¹²⁰ Because restraints on competition are necessary for the college sports industry to maintain its “product” (competition between teams), NCAA regulation that imposes such restraints cannot themselves be treated as violations of the Act.¹²¹

B. Questioning the Inadequacy of the Current Compensation Benefits

With the travel expenses waiver comes the inquiry into the compensation student-athletes already receive, and why it is not

transcript/ (describing economic consequences of increase in individual and regional sports team networks).

117. See *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 2:00-CV-1439, 2002 WL 32137511, at 6 (S.D. Ohio July 19, 2002) (citing *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019–20 (10th Cir. 1998)) (discussing standard for evaluating whether market exists for purposes of antitrust analysis).

118. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (holding that violation must substantially hinder actual commercial market).

119. See *Worldwide Basketball & Sports Tours, Inc. v. National Collegiate Athletic Association*, the court gave credence to the holding in *Board of Regents*, where the Supreme Court held that the NCAA was exempt from the traditional market analysis because its restraints were essential for the college sports industry to continue. See *Worldwide Basketball & Sports Tours, Inc. v. National Collegiate Athletic Ass'n*, 2002 WL 32137511, at 5 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984)).

120. See *id.* at 6–7 (deciding that although NCAA regulation may have some commercial impact, it did not fit relevant scheme for designation as market, and anti-competitive effects on particular market could not be identified).

121. See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016–18, 1024 (10th Cir. 1998) (requiring that different standard be used to assess NCAA regulation under Sherman Act).

enough.¹²² While some feel that student-athletes deserve compensation in exchange for their athletic participation, others believe it would be unfair to non-athlete students.¹²³ Universities offer athletes scholarship tuition to recruit athletes to their programs, which is perceived as a type of compensation.¹²⁴ Furthermore, students are not employees, and paying them for their performance would create an employee-employer relationship and all of the expectations and demands that follow.¹²⁵ Student-athletes receive benefits from their performance that have nothing to do with being paid, and compensation would negate many of these benefits.¹²⁶

Student-athletes also receive benefits such as the exclusive use of state-of-the-art athletic facilities, private tutoring and money towards textbooks.¹²⁷ The NCAA by-laws are clear about financial benefit to athletes not exceeding money for education.¹²⁸ Considering the NCAA's existing regulations concerning student pay, the introduction of the travel expense waiver blurs the line that distinguishes payment from nonpayment.¹²⁹

The NCAA defines payment as "the receipt of funds, awards or benefits not permitted by the government legislation of the Association for participation in athletics."¹³⁰ By its own definition, the NCAA considers payment as whatever the NCAA wishes to regulate.¹³¹ The loophole that the Association created will not fare well

122. See Lot Tan, *Scholarships Sufficient Compensation for Student-Athletes, Some Say*, DAYTON DAILY NEWS (Mar. 14, 2014, 6:00 AM), <http://www.daytondailynews.com/news/news/scholarships-sufficient-compensation-for-student-a/nfMgk/> (introducing debate over whether students currently receive enough benefit).

123. See *id.* (noting that unlike many other students, even scholarship athletes who do not make the professional draft graduate without debt).

124. See *id.* (describing argument that scholarships are compensation enough and that student athletes should not be paid).

125. See *id.* (describing NCAA's exclamation that students are not employees and cannot be expected to sacrifice studies for athletic performance).

126. See *id.* (describing how regimented and rigorous life of paid student athlete would be).

127. See Lazaroff, *supra* note 31, at 360–61 (listing ways in which students already receive compensation in exchange for athletic performance).

128. See 2015–16 NCAA MANUAL, *supra* note 15, art. 16.11.2 (defining any extra benefit as unethical and outside of NCAA's permitted conduct).

129. See Schwartz, *supra* note 14 (asserting that travel expense waiver directly undercuts NCAA bylaws prohibiting provision of "transportation or other benefits" for athletes, their relatives, or friends).

130. 2015–16 NCAA MANUAL, *supra* note 47, art. 12.02.08 (defining payment for purposes of NCAA legislation).

131. See *NCAA Paying for Parents to Get to Final Four, But Will This Pilot Program Become Permanent?*, N.Y. DAILY NEWS (Apr. 1 2015, 11:54 AM), <http://www.nydailynews.com/sports/college/ncaa-paying-parents-final-indianapolis-article-1.2169548> (discussing inconsistencies in NCAA promulgation of rules and bylaws).

in future suits with courts seeking more substantial justification.¹³² Indeed, the *O'Bannon* decision demonstrates that courts are already dissatisfied with the amateurism goals the NCAA promulgates.¹³³ The NCAA declared that in the case of the travel waiver, its focus was family.¹³⁴ However, a major concern stems from the fact that the NCAA maintains a strong focus and emphasis on the integrity of amateurism in its goals.¹³⁵

The NCAA currently still requires any student-athlete or recruit to be certified as an amateur athlete before being considered to play.¹³⁶ In declaring a new goal while refusing to budge on its existing ones, the Association essentially places a Band-Aid on a bullet hole.¹³⁷ The NCAA's waiver and its justifications offer no explanation for whether it will soon be permissible for other parties, such as boosters, or sponsors, to pay for travel expenses as well.¹³⁸ If this were to be the case, new practical and legal issues would arise, and open the door to lawsuits no longer just regarding antitrust violation but the degradation of the college sports industry as it currently exists.¹³⁹

In *O'Bannon*, where the district court ruled against the NCAA restrictions on likeness revenue sharing, the NCAA was still able to convince the court that certain restrictions on compensation to student-athletes are warranted to protect competitive balance, and the

132. See Schwartz, *supra* note 14 (declaring absence of bedrock foundational principle to support travel expense waiver). NCAA by-laws state, "Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics." 2015-16 NCAA MANUAL, *supra* note 47, art. 12.02.9 (defining pay as NCAA decides).

133. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (holding NCAA's sweeping prohibition on compensation insufficient without further justification), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

134. See *NCAA to Pay for Family Travel Under Pilot Program*, *supra* note 9 (quoting NCAA president as stating that families should have benefit of celebrating victories with student-athletes).

135. See *Amateurism*, *supra* note 6 (asserting quality of education as top priority and that athletes are "students first, athletes second").

136. See *id.* (instructing any potential student athlete to become certified as amateur before consideration).

137. See *NCAA Paying for Parents to Get to Final Four, But Will This Pilot Program Become Permanent?*, *supra* note 131 (noting existing and future complications in delegating reimbursement funds).

138. See *id.* (drawing attention to discrepancies between existing NCAA prohibitions and travel waiver).

139. See Schwartz, *supra* note 14 (raising concerns about implications of allowing certain types of benefits); Tan, *supra* note 122 (describing possible consequence that student-athlete selection would be completely irrelevant of academic performance in high school).

court of appeals ultimately agreed.¹⁴⁰ This small victory illustrates that both the Association and the courts are still holding steadfastly to the NCAA's code as it stands.¹⁴¹ Loosening compensation restrictions also presents the issue of students as employees, creating a pay-for-play, or rather a pay-to-win system.¹⁴²

IV. PROTECTING THE INTEGRITY OF COLLEGE SPORTS

NCAA compensation restrictions function to prevent players from being manipulated by their university.¹⁴³ Student-athletes need to be protected as players who not only devote their time to their team, but also to pursuing academic goals which are equally, if not more, important at this stage.¹⁴⁴ The Seventh Circuit Court of Appeals has recognized these goals to be necessary for preserving fair and honest competition among amateur college students.¹⁴⁵ That court, in *Banks v. National Collegiate Athletic Association*,¹⁴⁶ found the NCAA's requirements for member colleges to require minimum credit and GPA requirements to be in direct furtherance of academic goals and found in favor of the NCAA.¹⁴⁷ The court also found favor with the NCAA's restraints as pro-competitive and necessary to the college sports market.¹⁴⁸ The court further held

140. See *O'Bannon*, 7 F. Supp. 3d at 999–1000 (holding that some restrictions on compensation have valid precompetitive results); see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1074 (9th Cir. 2015) (finding “concrete procompetitive effect in NCAA’s commitment to amateurism”), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016).

141. See Lazaroff, *supra* note 31, at 346–48 (noting courts’ reluctance to rule against NCAA justifications unless absolutely no showing of precompetitive justification has been proffered).

142. See Will Leitch, *Can College Sports Survive Collective Bargaining?*, NEW YORK MAGAZINE (Apr. 20, 2014, 9:00 PM), <http://nymag.com/daily/intelligencer/2014/04/leitch-can-college-sports-survive-unions.html> (noting that compensation would require restructuring NCAA structure to accommodate student-employee model).

143. See Lazaroff, *supra* note 31, at 329 (noting importance of keeping college sports separate from professional).

144. See *id.* at 349 (discussing need to protect integrity of college sports model).

145. See *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992) (supporting NCAA restrictions for benefits to academic focus on student-athletes’ careers).

146. 977 F.2d 1081 (7th Cir. 1992).

147. See *id.* at 1088 (recognizing restrictions as integral to educational and academic experience unique to Division I athletics).

148. See *id.* at 1089 (finding that NCAA did not have goal of commercial advantage or exploitation, but of preserving public interest in college sports).

that the rules promoted fair competition, encouraged educational success and prevented commercialism.¹⁴⁹

A. Enhancing the Public Integrity and Interest

College sports are marketed differently and have a different audience than professional sports.¹⁵⁰ NCAA regulations are important to this distinction because they enhance public interest in the college sports industry.¹⁵¹ College athletes are simultaneously pursuing degrees that will prepare them to enter the employment market.¹⁵² Because their sole purpose is not to be athletes, they appeal to a different market than professional sports.¹⁵³ This factor serves as justification for the NCAA to maintain restrictions that hold a clear line between college and professional sports.¹⁵⁴ The NCAA regulations help to facilitate this distinction because the regulations are uniform across all member colleges.¹⁵⁵ Therefore, no school has a competitive advantage over another in marketing to the public.¹⁵⁶

B. Existing Options

NCAA member schools compete to recruit the best athletes by offering services in exchange for athletic performance.¹⁵⁷ With this exchange comes the understanding, which the NCAA and the courts have adhered to, that receiving improper compensation can lead to loss of eligibility.¹⁵⁸ The NCAA has the authority to regulate

149. *See id.* at 1090–91 (holding that NCAA restriction serves to establish distinction between professional and amateur sports, further academic priorities, and prevent labor market for college athletes).

150. *See The Largest, Most Attractive Fan Base in Sports*, *supra* note 2 (discussing difference in fan base between amateur and professional sports).

151. *See Amateurism*, *supra* note 6 (describing NCAA's role and mission in promoting the public's interest for college sports).

152. *See Banks*, 977 F.2d at 1090 (asserting that college athletes are preparing to enter market for non-athletic occupations).

153. *See id.* (stating that NCAA restrictions are legitimate way to protect college academics from being overshadowed by profit objectives). In *Banks*, the Court decided that the NCAA did not violate antitrust laws when it withdrew student's eligibility after he participated in professional draft. *See id.*

154. *See id.* (finding NCAA restrictions necessary to prevent athletes from focusing on professional prospects instead of academic pursuits).

155. *See id.* (acknowledging NCAA's minimum requirements for student-athletes pertaining to all member schools).

156. *See Lazaroff*, *supra* note 31, at 35–37 (discussing NCAA goal of equality among NCAA member institutions).

157. *See id.* at 344 (discussing interaction between NCAA, universities, and athletes in recruiting process).

158. *See id.* at 334–36 (providing example of sanctions held to be appropriate in light of NCAA goals and regulations).

and set standards for what schools are permitted to offer during recruitment.¹⁵⁹ When recruits enter this exchange, they agree to be responsible for any costs of participating in the program not covered by their scholarship.¹⁶⁰ In assuming these costs, student-athletes subject themselves to the NCAA's and their institution's rules in order to remain eligible to play while furthering both their academic and athletic careers.¹⁶¹ The travel expense waiver apparently declares one such cost, travel expenses for families, exempt from this consideration.¹⁶² With the announcement of the waiver, the NCAA also mentioned its recent steps to provide more benefits that sidestep the no-compensation rules.¹⁶³

The goal for many recruits is to eventually play professionally.¹⁶⁴ During recruitment, high school athletes who have an interest in playing professionally know that the way to get there is by playing for a Division I team.¹⁶⁵ For these students, their university is aiding them in gaining public notoriety, and in turn, helping them in their pursuit of playing professionally.¹⁶⁶ If it were not for this platform, student-athletes would have no framework for attempting to seek revenue from the use of their likeness.¹⁶⁷ Despite these athletes' vehement protests that this type of litigation is their

159. See *id.* at 331–32 (describing standardization principles behind NCAA enforcement policies).

160. See *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that student athletes contract to be students of their universities, and not professional athletes in a business context).

161. See *id.* at 303 (noting that students are not market competitors, and therefore, the NCAA is not governed by antitrust laws).

162. See *NCAA to Pay for Family Travel Under Pilot Program*, *supra* note 9 (setting out guidelines for implementation of travel expense waiver).

163. See *id.* (mentioning NCAA's continued efforts toward improving travel experience for students and families).

164. See *Probability of Competing in Sports Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last visited Apr. 17, 2016) (comparing most college athletes' intentions of being professionally drafted during academic career to actual percentage of drafted athletes).

165. See *Estimated Probability of Competing in College Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-college-athletics> (last visited Apr. 17, 2016) (describing NCAA Division I program participation as primary source for professional draft). In fact, participation in Division I teams is almost exclusively the only way for an athlete to reach a professional career. See Tan, *supra* note 122 (recognizing general acceptance of professional teams drafting solely from Division I programs).

166. See Rovell, *supra* note 110 (indicating that NCAA teams regularly allocate funds to media publicity).

167. See Wong et al., *supra* note 2, at 53–54 (explaining fans' devotion and loyalty to college athletes, largely due to respect for hard-working students, which contributes to sales of college team apparel and merchandise).

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only mechanism for seeking adequate payment for the money they bring in, the majority of the public, including coaches and players, oppose compensation, believing that scholarships and the advantages of being a student-athlete are sufficient opportunities.¹⁶⁸ Such lawsuits demonstrate these student-athletes' are attempting to bite the hands that feed them.¹⁶⁹

V. CONSEQUENCES OF PAYING STUDENT-ATHLETES

A. The College Athlete Dynamic

Concerns about paying student-athletes center around an idea similar to the NCAA's purported justification for its restrictions: protecting the academic integrity of the student-athlete.¹⁷⁰ Proponents of compensation for student-athletes are concerned that the NCAA, instead of being focused on academic success, simply endeavors to exploit athletes and their universities for profit.¹⁷¹ These criticisms turn on the greed of the NCAA and the detrimental effects of industry on student-athletes.¹⁷²

Ironically, the proposed solution to this argument would only aggravate the problem.¹⁷³ Continuing to open more avenues for student-athletes to be paid is a slippery slope towards an employer-employee relationship, and the exploitation of the student-ath-

168. See Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, *Washington Post-ABC News Poll Finds*, WASH. POST (Mar. 23, 2014), https://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html (reporting general public opinion poll results). University of Maryland Athletic Director Kevin Anderson also commented, "You have an opportunity. If you don't want to be a student-athlete, you can say no and not go to school." *Id.*

169. See Rovell, *supra* note 110 (describing sacrifices Division I programs make to ensure their players receive quality benefits, even when it means cutting into profit, and general public's misconceptions about special treatment players receive).

170. See, e.g., *Amateurism*, *supra* note 6 (highlighting education as NCAA's top priority); Jonathon Chait, *Fixing College Sports: Why Paying Student Athletes Won't Work*, *NEW YORK MAGAZINE* (Nov. 29, 2011, 12:36 PM), <http://nymag.com/daily/sports/2011/11/chait-why-paying-student-athletes-wont-work.html> (noting quality of college education as major concern in student-athlete compensation debate).

171. See, e.g., Taylor Branch, *The Shame of College Sports*, *THE ATLANTIC*, Oct. 2011, available at http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true (asserting that Division I schools have no choice but to accept money from NCAA despite unfair revenue-sharing).

172. See *id.* (noting that universities are powerless to corporations that offer money for student athletes' performance, and thus corruption is only kept at bay by NCAA anti-compensation policies).

173. See Chait, *supra* note 170 (arguing that compensating student-athletes would subject them to market forces, cutting against goal to protect them).

lete.¹⁷⁴ Were performance to be rewarded with compensation, the incentive for athletes to demand money based on individual and team successes would strain the quality of athletic programs, and might even result in cutting women's and non Division I teams, creating not only outrage but also discrimination claims.¹⁷⁵ The delegation of pay to student-athletes, like the decision to reimburse travel expenses for some families over others, would naturally lead to compensation directly based on the profit the players bring into the university.¹⁷⁶

The introduction of compensation would also raise the issue of athletes being paid in relation to the size of their fan base.¹⁷⁷ This would ultimately degrade any college athlete's chance of receiving a quality education, which is what athletic scholarships are intended for.¹⁷⁸ The travel expense waiver raises an issue already present within the student compensation debate: whether performance or need-based, which athletes (and their families) should get paid?¹⁷⁹

B. Alternatives to Pay-For-Play

Ideas for alternatives to student compensation have been raised by way of reform within the NCAA and within the universities themselves.¹⁸⁰ Schools have a better chance of instituting changes than reform of the NCAA.¹⁸¹ A possible reform, which would rec-

174. See Nick Desai, *Colleges Should Be About Education First*, HUFFINGTON POST (Aug. 11, 2014, 6:30 PM), http://www.huffingtonpost.com/nick-desai/colleges-should-be-about_b_5669998.html (arguing that outcome-based compensation creates divide between students and athletes, placing higher value on athletes). This approach also overlooks the fact that the students not being considered for compensation are those whose academic pursuits are the primary goal of the academic institution. See *id.* (asserting college sports' value as supplementing academic morale and engagement).

175. See Chait, *supra* note 170 (explaining compensation's likely implications for decreased work ethic in compensated and uncompensated athletes).

176. See Joe Nocera, *The Institutional Pass*, N.Y. TIMES (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/opinion/nocera-the-institutional-pass.html?_r=0 (explaining risks of subjecting student-athletes to profit-based treatment).

177. See Chait, *supra* note 170 (discussing issues likely to arise when paying student-athletes based on factors such as performance, revenue, and spectatorship).

178. See *id.* (noting that for most college athletes, education is more valuable than playing time, and those few who go pro view education as fallback option).

179. See *id.* (discussing discrimination issues raised by allowing schools to compensate student-athletes).

180. See Lazaroff, *supra* note 31, at 362 (suggesting such NCAA reform as amending or eliminating certain restraints involved in antitrust disputes).

181. See *id.* at 365 (explaining universities' options in likely case that NCAA does not reform nor provide further justification for its compensation restrictions).

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oncile the travel expense waiver, would be to revert to the thirty-year old rule which did not allow freshman to play on their college team, allowing them to focus on academics for the first and most transitional year of college.¹⁸² In this scenario, while travel expenses still raise a serious pay-to-win issue, the freshman year rule may strike a balance by putting academics first before any issue of compensation arises.¹⁸³ Most importantly this alternative would preserve the foundational goal of preparing student-athletes as contributors to society.¹⁸⁴

Another suggestion is to guarantee every athlete free tuition as long as no rules are violated.¹⁸⁵ Other alternatives focus on a stipend for student-athletes held in trust until the student graduates.¹⁸⁶ For the travel expenses waiver to stand alone without conflicting with the NCAA's mission, the NCAA still must declare a line denoting what kind of compensation is prohibited, or else prepare for a continuous onslaught of criticism and resulting litigation.¹⁸⁷

VI. CONCLUSION

The travel expense waiver is another controversial diversion from the NCAA's self-determined boundaries, which confuses the basis for prohibiting student-athlete compensation.¹⁸⁸ The waiver conveniently allows the NCAA to conduct business as it pleases with-

182. See Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS ARCHIVE (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateuism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html> (setting out historical timeline of NCAA amateurism rules); see also Chait, *supra* note 170 (describing benefit to be derived from further demonstrating appropriate priorities and decreasing likelihood of graduating without solid education).

183. See Chait, *supra* note 170 (discussing issue of some college freshmen becoming famous before setting foot in the classroom, opening door for multitude of compensation issues).

184. See Nocera, *supra* note 176 (emphasizing universities' true educational purpose).

185. See Ken Reed, *Solution Regarding Paying College Athletes or Not is Simple*, HUFFINGTON POST (Nov. 13, 2015), http://www.huffingtonpost.com/ken-reed/solution-regarding-paying_b_8556872.html (proposing salary format as option for student athlete compensation).

186. See Lazaroff, *supra* note 31, at 367 (suggesting stipend as compromise for NCAA in light of many college athletes' disadvantaged backgrounds).

187. See Kastenburger & Pratt, *supra* note 19 (noting courts' hesitance to allow student-athletes too many options for procuring compensation and NCAA's opportunity to appeal current standing decisions against it).

188. See Schwartz, *supra* note 14 (describing NCAA's ironic departure from amateurism goal to purport family as overriding consideration in enacting travel waiver).

out lifting restrictions as they pertain to outside parties.¹⁸⁹ This inconsistency and failure to cover all bases incentivizes other parties to cut corners as well.¹⁹⁰ Member schools and athletes are already finding ways to maneuver around the NCAA restrictions.¹⁹¹ The waiver for travel expenses only fuels the fire and continues to perpetuate this cycle.¹⁹² The NCAA's lackluster justifications have not gone unnoticed, by the public or the courts.¹⁹³ Opening up more avenues for compensation only increases the likelihood of more challenges to the NCAA regulations.¹⁹⁴ The more litigation that aims to invalidate the NCAA's goals, the less effective the Association will be at regulating college athletics.¹⁹⁵

The NCAA purports to strive for maintaining a competitive balance between college teams and preserving the integrity of college athletics, and undercutting these missions degrades the public interest and respect, and therefore, the market of the industry.¹⁹⁶ Travel expenses for families of students who make it to the Final Four and Championship games makes the compensation depen-

189. *See id.* (noting inconsistency in NCAA's purported goals in prohibiting compensation and travel expense waiver's allowance of extra benefits).

190. *See* Chait, *supra* note 170 (questioning what is to prevent public or private parties from petitioning NCAA or member institutions to allow donation in light of NCAA's stated goal of family incorporation in enacting travel waiver).

191. *See, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996 (describing likeness licensing litigation); *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 2:00-CV-1439, 2002 WL 32137511 (S.D. Ohio July 19, 2002) (describing antitrust litigation); *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149 (Pa. Commw. Ct. 2013) (discussing Commerce Clause implications); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (describing litigation concerning unreasonable restraint of trade); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (describing antitrust and trade litigation), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, No. 15-1167 (U.S. Mar. 14, 2016); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (describing blanket license arrangement dispute).

192. *See, e.g.,* Schwartz, *supra* note 14 (highlighting NCAA's history of inconsistency in justifying its regulations).

193. *See id.* (describing public complaints from coaches, university athletic programs about NCAA's absolute compensation restrictions).

194. *See id.* (discussing endless cycle of questions and issues raised by NCAA continuing to rule against its own principles).

195. *See* Kastenburger & Pratt, *supra* note 19 (noting that judicial decisions are trending in direction of establishing more bases for student-athlete suits seeking compensation).

196. *See* Lazaroff, *supra* note 31, at 330 (describing constant challenges to NCAA's authority); *see also* Schwartz, *supra* note 14 (noting lack of respect for NCAA policies without basis of supported and accepted foundational principles).

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dent on athletic performance, in turn violating all that is sacred about college sports.¹⁹⁷

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197. See New, *supra* note 62 (noting further inequalities created by giving some, but not all, athletes various forms of compensation); see also Chait, *supra* note 170 (asserting that provision of quality education is most important goal in college athletics, and is in danger of being tainted by monetary compensation).

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